03-282

No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

JOHN PADBERG, CLIFFORD PAOLILLO, and RASHID AHMED, individually and on behalf of all others similarly situated,

Petitioners,

-against-

DIANE MCGRATH-MCKECHNIE, RUDOLPH W. GIULIANI, JOSEPH MCKAY, MATTHEW DAUS, HARRY RUBINSTEIN, ELLIOT SANDER, HARVEY GIANNOULIS, MARVIN GREENBERG, RAMONA WHALEY, AND THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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September 15, 2003

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QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit properly affirm the District Court's dismissal of Petitioners' substantive and procedural due process claims on summary judgment, where:

1) Petitioners failed to show that Respondent the New York City Taxi and Limousine Commission ("TLC") lacked authority to revoke taxi drivers' licenses for one or two unjustified service refusals, let alone that the challenged revocation policy constituted outrageously arbitrary government action; and

2) Petitioners failed to show that taxi drivers were unaware that one or two service refusals could trigger license revocation?

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BRIEF IN OPPOSITION

STATUTORY PROVISIONS

The Petition omits reference to the following statutes and rules, the full text of which may be found in the appendix hereto.

New York Civil Rights Law

Article 4, Section 40-e. Innkeepers and carriers refusing to receive guests and passengers

Administrative Code of the City of New York (the "Code")

Title 19, Chapter 5, Sections 505(*l*); 506; and 507(e)

Rules of the City of New York (the "Rules")

Title 35, Chapter 2, Sections 2-50; 2-61; 2-86; 2-87; 2-88; Chapter 8, Sections 8-03 and 8-14

STATEMENT OF THE CASE

A. Nature of the Case

Petitioners commenced this action on behalf of themselves and a putative class of New York City (the "City") taxi drivers, alleging that the following two TLC policies violated the Fourth, Fifth and Fourteenth Amendments of the United States Constitution, as well as Article 1, section 6, of the New York State Constitution: (1) the summary suspension of taxi drivers' licenses based upon unjustified passenger service refusals (the "summary suspension policy"); and (2) the suspension or revocation of taxi drivers' licenses, after a hearing, for first or second unjustified service refusals (the "suspension and revocation policy"). In addition to other relief, Petitioners sought reinstatement of all licenses suspended or revoked based upon "an allegation or finding of service refusal."[1]

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[1] Contrary to Petitioners' assertion (Petition at 5), they never sought a declaration that the TLC "violat[ed] . . . 42 U.S.C. § 1983." Petitioners consistently refuse to acknowledge this Court's precedent that "one cannot go into court and claim a 'violation of § 1983' -- for § 1983 by itself does not protect anyone against anything." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979).

As Petitioners admit (Petition at 12), only the suspension and revocation policy, pursuant to which the TLC revoked the taxi driver's license of Petitioner John Padberg ("Padberg") for having committed a race-based service refusal, is at issue on this Petition. Contrary to the Petition (at page 5), Petitioners Clifford Paolillo and Rashid Ahmed were unaffected by the suspension and revocation policy. Thus, Respondents do not address Petitioners' assertions regarding the summary suspension policy, all of which are irrelevant here.

B. Statement of Relevant Facts

1. The Taxi and Limousine Commission

Established by Chapter 65, section 2300 of the New York City Charter (the "Charter") for the purpose of "further development and improvement of taxi and limousine service in the City of New York," the TLC administers and enforces the City's licensing and regulatory system for taxis. The TLC's "jurisdiction, powers and duties" include "[t]he issuance, revocation, [and] suspension of licenses for [taxicab] drivers" and "[t]he formulation, promulgation and effectuation of rules and regulations reasonably designed to carry out the purposes, terms and provisions of this chapter." Charter §§ 2303 (5) and (11).

Code section 19-505(a) forbids anyone to drive a taxi in the City without a TLC taxi driver's license. Licensed taxi drivers must comply with TLC's Taxicab Drivers Rules, which are codified in Chapter 2 of the Rules. *See* Code § 19-505(k).

2. Service Refusals

The Rules forbid taxi drivers "to seek to ascertain the destination of a passenger before such passenger is

seated in the taxicab" or to "refuse by words, gestures or any other means, without justifiable grounds . . . , to take any passenger to any destination within the City of New York." Rules 2-50(a) and (b). Drivers who violate this Rule face mandatory minimum penalties ($250-$300 for a first service refusal, and $350-$500 for a second service refusal within two years), and – for three service refusals within three years – mandatory license revocation. Rule 2-87(a)(1); *see also* Code § 19-507(b)(1). However, Rule 2-87(a)(1) explicitly provides that "[n]othing contained herein shall limit or restrict any other authority the Commission may have to suspend or revoke a driver's license." *See also* Code § 19-505(*l*) (authorizing TLC to suspend or revoke licenses for any violation of the Code or Rules).

3. Conduct Contrary to the Best Interests of the Public

The Rules also forbid taxi drivers, while performing their duties and responsibilities, to "commit or attempt to commit, alone or in concert with another, any willful act of omission or commission which is against the best interests of the public, although not specifically mentioned in these Rules" Rule 2-61(a)(2). Under Rule 2-86, drivers who commit acts contrary to the best interests of the public may incur a penalty of "$150-350 and/or suspension up to 30 days or revocation."

4. The TLC's Discretionary Authority to Suspend or Revoke Licenses

The TLC retains discretion to suspend or revoke licenses for violations of any Code section or Rule. Code § 19-505(*l*); *see also* Rules 2-88, 8-03, and 8-14(a).

5. Suspension and Revocation Procedures

Under Rule 8-14(b), "[i]f the specific rule violation [the TLC] charge[s] provides for the discretionary penalty of revocation, the proceeding shall be commenced before the Commission Adjudications Tribunal and heard by an ALJ [administrative law judge]." In that event, the driver receives a written summons "detailing the charged misconduct and warning . . . that a finding of guilt could result in the revocation of his license," as well as information regarding the location, date and time of any scheduled hearing. Rule 8-14(c-e).

In revocation proceedings conducted by the TLC Adjudications Tribunal, the ALJ issues a Recommendation to the Chairperson "containing his findings of fact, conclusions of law and recommended penalties." Rule 8-14(h). Upon issuance of the ALJ's Recommendation, the driver has an "opportunity to provide a written response to said Recommendation, limited to the record of the hearing and the determination of the ALJ with respect to penalty only." Rule 8-14(i). The TLC Chairperson then considers the Recommendation, along with any written comments the driver may have submitted, and decides whether to accept, modify or reject the ALJ's Recommendation. Rule 8-14(j).

The driver may appeal the Chairperson's final decision to the full Commission. Rule 8-14(k). The TLC's final determination is subject to review in the New York State Supreme Court pursuant to Article 78 of the New York State Civil Practice Law and Rules.

Petitioners have never argued that the foregoing suspension and revocation procedures violate procedural due process.

6. Operation Refusal

In response to passenger complaints regarding service refusals, the TLC commenced "Operation Refusal" in 1996. As part of Operation Refusal, undercover police officers and TLC inspectors posing as passengers issue summonses to drivers who fail to stop for hails, or who refuse to travel to lawful destinations.

On November 11, 1999, the TLC Chairperson announced that service refusals threaten the public welfare. Accordingly, the TLC Chairperson directed Operation Refusal enforcement personnel to charge service refusals as violations of both Rule 2-50(b) (service refusal) and Rule 2-61(a)(2) (conduct contrary to the best interests of the public), and the TLC's Chief ALJ later directed TLC ALJs to treat service refusals as violations of both Rules.

During a subsequent radio address, Mayor Giuliani stated that because of "serious" and "prevalent" concerns regarding taxi drivers' race-based service refusals, he had directed the New York City Police Department and the TLC "to intensify their existing enforcement" of Operation Refusal. "The idea is to send out additional undercover officers to hail cabs," the Mayor explained, "and when cabbies don't stop [for minority passengers] . . . the officers will fine them, suspend their licenses, and take their cabs to a police precinct until it can be picked up."[2]

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[2] By admitting they "do not know how many cabbies Operation Refusal" supposedly "threw out of work" (Petition at 12), Petitioners contradict their earlier assertion that they are "among the hundreds" of taxi drivers whose hack licensees supposedly "were suspended without hearings and later revoked" (Petition at 5; see also *id.* at 1). Furthermore, (1) the TLC neither suspended nor revoked Petitioner Paolillo's hack license; and (2) the TLC

On November 10, 1999, the TLC notified taxi drivers of the TLC's enforcement initiative. In addition to reciting other penalties for service refusals, the notice cautioned that the TLC "may, in its discretion, seek the penalty of revocation of the driver's license for any and all appropriate rule violations" (C.A. App. 229).[3] Petitioners' summary of the notice omits the quoted language (Petition at 8-9, 18, 20).

As show below (at pages 16-18), Petitioners are wrong to claim that the TLC Commissioners rejected the suspension and revocation policy (Petition at 10-11).[4]

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suspended, but never revoked, Petitioner Ahmed's hack license. Finally, Petitioners have never challenged the TLC's statement that taxi drivers who lose their licenses under the suspension and revocation policy may seek reinstatement after one year (Resp. Br. at 19 n.12).

[3] Unless otherwise indicated, (1) numbers in parentheses preceded by "C.A. App." refer to pages in the Joint Appendix filed with the Second Circuit; and (2) numbers in parentheses preceded by "A" refer to pages in the Appendix to the Petition.

[4] Petitioners also mischaracterize the April 2000 correspondence between the TLC Chairperson and OATH Chief ALJ Rubin (Petition at 11). In her letter, the TLC Chairperson clarified OATH's authority to recommend license revocation for first-time service refusals and, citing a TLC ALJ's recommendation of license revocation as the penalty for a service refusal, requested reconsideration of the recommended non-revocation penalty in several OATH cases (C.A. App. 59-62). Judge Rubin responded that she lacked authority to direct OATH Administrative Law Judges to reconsider their recommendations (C.A. App.

7. Revocation of John Padberg's License

On February 15, 2000, a TLC Inspector issued two summonses to Petitioner John Padberg ("Padberg"), one for refusing service on the basis of race (in violation of Rule 2-50(b)), and another for committing an act against the best interests of the public (in violation of Rule 2-61(a)(2)).

During a subsequent TLC administrative hearing, TLC Inspectors Alston (who is black) and Bonilla (who is white) testified that although they hailed Padberg's cab virtually simultaneously, Padberg drove past Inspector Alston and stopped for Inspector Bonilla. Padberg claimed that he saw Inspector Bonilla hail him first, failed to notice Inspector Alston until he drove through the intersection where Inspector Alston stood, and was uncertain as to whether Inspector Alston was trying to hail him.

The ALJ credited the TLC Inspectors' "credible and consistent testimony" that Padberg ignored Inspector Alston's hail and bypassed him to stop for Inspector Bonilla, but discredited Padberg's testimony. Accordingly, the ALJ determined that Padberg violated Rules 2-50(b) and 2-61(a)(2). After reviewing Padberg's TLC violation history (including "repeated passenger harassment and abuse and service refusals") and DMV driving record (indicating an accumulation of 10 points for "passing red lights, disobeying traffic devices and making an improper turn"), the ALJ recommended license revocation.

Padberg received a copy of the ALJ's Recommendation and, through counsel, submitted a letter and character references to the TLC. After reviewing Padberg's submissions, the TLC Chairperson accepted the

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63). In any event, Judge Rubin added, the TLC was free to reject OATH ALJ penalty recommendations (*id.*).

ALJ's Recommendation and revoked Padberg's license. Under Rule 8-14(k), Padberg could have appealed the TLC Chairperson's decision to the full Commission, but failed to pursue such an administrative appeal before his right to do so expired on June 9, 2000.

8. Procedural History

After commencing this action, Petitioners moved by order to show cause for a temporary restraining order and preliminary injunction prohibiting the TLC from enforcing the suspension and revocation policy, *inter alia*, and directing the TLC to reinstate Padberg's license. During oral argument on Petitioners' motion, their counsel admitted that service refusals affect the public welfare (C.A. App. 91, 103).

By Memorandum and Order (one paper) entered August 14, 2000 (the "August 14 Order"), and reported at 108 F. Supp. 2d 177 (E.D.N.Y. 2000), the District Court denied Petitioners' motion (A55-81). With respect to the TLC's suspension and revocation policy, Petitioners failed to persuade the District Court that the TLC lacked authority to revoke a hack license for a first or second service refusal (A69-72).[5]

Subsequently, Petitioners moved, and Respondents cross-moved, for summary judgment. To support their motion, Petitioners argued that the suspension and

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[5] Citing *Salahuddin v. Coughlin*, 781 F.2d 24, 27 n.4 (2d Cir. 1986), the District Court explained that an unauthorized revocation of Padberg's license "would deprive him of his property without due process" (A69-70). Thus, Petitioners are wrong to assert (at page 14 n.2 of the Petition) that the District Court "never mentioned the concept" of substantive due process in the April 14 Order.

revocation policy violated due process because, *inter alia*, (i) Mayor Giuliani and the TLC Chairperson allegedly implemented the policy without the Commission's formal approval; (ii) the Code supposedly prohibits license revocations for first and second service refusals; and (iii) Rule 2-61(a)(2), which prohibits conduct adverse to the public interest, is somehow unconstitutionally vague. As purported support for their arguments, Petitioners cited substantive due process rules from *Salahuddin*, 781 F.2d at 27 n.4, and *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir.), *cert. denied*, 488 U.S. 868 (1988).

In opposition, and in support of Respondents' cross-motion for summary judgment, Respondents contended that under Charter section 2301(c), which authorizes the TLC Chairperson to "assign and superintend the duties of such officers and employees as may be necessary to carry out the provisions of this chapter," the TLC Chairperson properly directed TLC personnel to respond more forcefully to service refusals.

Respondents further contended, *inter alia*, that Code section 19-505(*l*) – authorizing the TLC to suspend or revoke licenses for any violation of the Code or Rules – permitted the TLC to revoke a driver's license even for a first service refusal.

C. District Court's Opinion and Order

In its April 29, 2002 Memorandum and Order (one paper) resolving the parties' motions for summary judgment (A4-54) (the "April 29 Order"), the District Court, after ruling that the TLC's summary suspension policy violated Petitioners' procedural due process rights (A23-34), considered Petitioners' challenges to the TLC's suspension and revocation policy (A34-48). To the extent Petitioners disputed the authority of the Mayor, the TLC Chairperson, and the TLC to suspend or revoke licenses for

a first or second service refusal, the District Court applied substantive due process analysis (A34-42). With respect to Petitioners' vagueness challenge, however, the District Court applied procedural due process rules (A42-45).[6]

The District Court reasoned that because Charter section 2301(c) at least arguably authorized the TLC Chairperson to promulgate enforcement policies without a full Commission vote, her conduct may have been "incorrect" or "ill-advised," but it was not unconstitutional (A37-38). "Nor is it entirely clear," the District Court added,

> that [the] Chairperson['s] understanding of her own authority was incorrect. Plaintiffs have provided no authority, other than the language of the . . . Charter itself, supporting the proposition that the Chairperson needed the vote of the Commission to promulgate an enforcement policy such as Operation Refusal. With only the language of the Charter to follow, the Court cannot say with certainty that [the] Chairperson['s] actions were even unauthorized, much less that they were arbitrary in the constitutional sense.

(A37-38).

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[6] Because Petitioners had relied upon substantive due process rules in their supporting memorandum (see page 9 above), they are wrong to accuse the District Court of invoking substantive due process standards *sua sponte* (Petition at 14). Indeed, the District Court explicitly referenced and rejected Petitioners' substantive due process argument (A34-35, 53).

Furthermore, the District Court noted, nothing suggested that either Mayor Giuliani or the TLC Chairperson "were prompted to act by anything but legitimate motives" (A38):

> Both were attempting to rectify the problem of race-based service refusals among taxicab drivers by increasing the penalties imposed for such an infraction. Plaintiffs' bare allegation that Mayor Giuliani initiated this new enforcement program in response to a highly publicized complaint in order to further his own political purposes, if credited, does not render the conduct a gross abuse of government authority. The Mayor was responding to a matter of public concern.

(A38).

"In sum," the District Court determined, "these are not the type of egregious government actions that offend substantive due process" (A38).

Similarly, the District Court held, because Code section 19-505(*l*) and Rule 2-61(a)(2) at least arguably authorize license suspension and revocation for first and second service refusals, the TLC's suspension and revocation policy "was not arbitrary or irrational and therefore did not violate substantive due process" (A38-42).

Finally, the District Court rejected Petitioners' procedural due process challenges to Rule 2-61(a)(2), which prohibits conduct adverse to "the best interests of the public" (A42-45). Because "a reasonably prudent taxicab driver, presumed to be familiar with TLC rules and TLC objectives, has more than fair warning that an unjustified

denial of service is conduct against the specific public interests the TLC was created to serve," the District Court reasoned, Rule 2-61(a)(2) is not unconstitutionally vague as applied to Petitioners (A44-45).

For these reasons, the District Court granted Respondents' cross-motion for summary judgment as to Petitioners' substantive due process challenge to the suspension and revocation policy, and as to Petitioners' vagueness challenge (A50).

D. The Opinion of the United States Court of Appeals for the Second Circuit

Affirming the April 29 Order, the Second Circuit determined that (1) the relevant "regulations can reasonably be read to permit the imposition of license suspension or revocation" for a first or second service refusal; and (2) the Charter "can reasonably be read to grant the [TLC] Chairwoman power to carry out the regulations on her own," *i.e.*, without a TLC Commission vote (A2-3). "Because a reasonable, though arguably incorrect, interpretation of the city regulations supports the Chairwoman's actions," the Second Circuit then held, citing *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 145 (2d Cir. 1994), "these actions were not 'arbitrary or irrational' and therefore do not give rise to a constitutional violation" (A3).

The Second Circuit also affirmed the District Court's rejection of Petitioners' vagueness challenge, because taxi drivers had fair notice that service refusals constituted conduct adverse to the best interests of the public, and therefore violated both Rule 2-50(b) (service refusals) and 2-61(a)(2) (best interests) (A3).

REASONS FOR DENYING THE PETITION

A. Petitioners have Failed to Raise any "Certworthy" Issues for this Court's Review.

Petitioners never argue that the Second Circuit's decision (1) conflicts with the decision of any other federal appellate court; (2) conflicts with any decision by a state court of last resort; (3) "so far depart[s] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power"; (4) resolves an important federal question that this Court should resolve; or (5) resolves an important federal question "in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10. Rather, Petitioners merely (and incorrectly) argue that the Second Circuit misapplied the law. Accordingly, this Court should deny the Petition.

B. The Second Circuit Properly Rejected Petitioners' Substantive Due Process Claims

Nothing in the Petition undermines the Second Circuit's rationale for rejecting Petitioners' substantive due process claim: (1) the Charter and relevant regulations "can reasonably be read" to authorize the suspension and revocation policy; and (2) the TLC's rational, non-arbitrary legal interpretations do not violate Petitioners' substantive due process rights (A3). *See, e.g., Bishop v. Wood*, 426 U.S. 341, 350 (1976) (due process clause "is not a guarantee against incorrect or ill-advised [government] decisions"); *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995) ("Substantive due process protects against government action that is arbitrary, conscience shocking, or oppressive in a constitutional sense, but not against government action that is 'incorrect or ill-advised.'"); *Interport*, 14 F.3d at 144-45 (because it was neither arbitrary nor irrational, Board of Commissioners'

erroneous policy statement did not violate substantive due process).[7]

As an initial matter, this Court should reject Petitioners' attempt to criticize the Second Circuit and the District Court for rejecting Petitioners' arguments on substantive due process grounds (Petition at 14 & n.2, 16-18). Contrary to Petitioners' revisionist history (Petition at 14 & n.2), they commenced this action challenging the suspension and revocation policy as lacking a "legal, statutory or regulatory basis and depriv[ing] taxi drivers of their property without due process of law" (C.A. App. 14 [¶1]; C.A. App. 20 [¶27]). Similarly, in support of their summary judgment motion, Petitioners cited substantive due process rules from *Salahuddin*, *Bello*, and *Monroe v. Pape*, 365 U.S. 167 (1961). Proceeding to frame the key issue in this case as one of substantive due process, Petitioners asked "whether defendants had legal authority" to revoke hack licenses.

Thus, Petitioners attacked the suspension and revocation policy (albeit without justification) on substantive due process grounds. *See, e.g., Sameric Corp. v. City of Philadelphia*, 142 F.3d 582, 594 (3d Cir. 1998) (applying substantive due process rules to reject claim that city exceeded its authority when designating theater as an historic building). Accordingly, the Second Circuit and District Court properly invoked substantive due process when rejecting Petitioners' arguments.

Despite attempting to disavow their substantive due process claim, Petitioners unjustifiably criticize the Second Circuit's decision on substantive due process

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[7] Notwithstanding the Second Circuit's reliance on *Interport* (A3), Petitioners fail to cite it, let alone attempt to distinguish it.

grounds. Repeating twice-rejected legal arguments, Petitioners claim that (1) the full TLC Commission "never voted" on the suspension and revocation policy (Petition at 18-21); and (2) the mere (alleged) illegality of the suspension and revocation policy supposedly violates Petitioners' constitutional rights. These arguments fail.[8]

1. The Charter Authorized Implementation of the Suspension and Revocation Policy without a Full Commission Vote.

For several reasons, Petitioners' "voting" argument lacks merit. First, as the Second Circuit and the District Court held, the Charter at least arguably authorized TLC Chairperson to implement the suspension and revocation policy without a full Commission vote.

Charter section 2301(c) authorizes the TLC Chairperson to "superintend" the duties of TLC officers and employees "as may be necessary to carry out the provisions" of Charter Chapter 65, which calls for "development and improvement of taxi . . . service," "promotion and protection of the public comfort and convenience," and the establishment of "standards of service," *inter alia.* Charter § 2300; *see also* Charter § 2303(b)(2, 5, 10).

Consistent with these provisions, the TLC promulgated Rule 2-50(b) (service refusals), Rule 2-

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[8] In Petitioners' view, the alleged illegality of the suspension and revocation policy somehow violates section 1983 (Petition at 21-26). Because section 1983 "does not provide a remedy for abuses that do not violate federal law," *Collins v. City of Harker Heights*, 503 U.S. 115, 119 (1992), we construe Petitioners' argument as implicating substantive due process.

61(a)(2) (best interests), as well as penalties for Rule violations. The TLC Chairperson then exercised her superintendent authority by directing TLC officers and employees to enforce Rule 2-50(b) by treating service refusals as conduct adverse to the best interests of the public. As Petitioners never dispute, administrative officials may exercise statutorily-given administrative discretion, guided by "reasonably practicable" standards, to execute the law. *Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976); *Barton Trucking Corp. v. O'Connell*, 7 N.Y.2d 299, 307 (1959). Having conceded that service refusals affect the public welfare, Petitioners' counsel must concede the rationality of the TLC Chairperson's exercise of administrative discretion.

Indeed, Petitioners fail to cite any authority to support their view that, even though the Charter, Code and Rules authorize license revocation after one service refusal, the Charter required the TLC Chairperson to submit the suspension and revocation policy to a full Commission vote.[9]

Thus, as the Second Circuit held, the Charter can reasonably be read to authorize the TLC Chairperson's implementation of the suspension and revocation policy without a full TLC Commission vote.

This Court should also reject Petitioners' attempt to establish a substantive due process violation by speculating, contrary to fact, that a majority of TLC Commissioners would have voted to reject the suspension and revocation policy (Petition at 19).

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[9] Nor do Petitioners cite any authority to support their assertion (Petition at 20) that the TLC Chairperson should have abandoned the suspension and revocation policy merely because some OATH judges disagreed with it.

Belying Petitioners' speculation, the TLC Commission voted unanimously, in May 2000, to revoke the license of taxi driver Jung Park pursuant to the suspension and revocation policy. The Commission voted to revoke Park's license notwithstanding an OATH ALJ's erroneous determination that the Code forbids license revocation for one service refusal (C.A. App. 52-58, 69).

Petitioners are also wrong to assert that the TLC Commissioners "rejected the chairwoman's edict" during a July 2000 hearing (Petition at 19). Rather, the TLC Chairperson noted the TLC's authority to revoke licenses after one service refusal (C.A. App. 353, 367); one Commissioner questioned the TLC's authority to do so (C.A. App. 353-59); Commissioner Arout, who acknowledged his lack of legal training, expressed confusion over how to apply Code section 19-507(b)(1) (service refusal penalties) (C.A. App. 343-44); and three Commissioners expressed their willingness to revoke a license after one service refusal (C.A. App. 344, A367).

Thus, Petitioners' factually-contradicted speculation about the TLC Commission is insufficient to manufacture a substantive due process violation.

2. Merely Unauthorized Governmental Conduct does not Violate Substantive Due Process.

Even assuming the Charter required a full TLC Commission vote, the TLC's implementation of the suspension and revocation policy still did not violate substantive due process.

As this Court held in *Snowden v. Hughes*, 321 U.S. 1, 11, *reh'g denied*, 321 U.S. 804 (1944) "[m]ere violation of a state statute does not infringe the federal Constitution." *See also Paul v. Davis*, 424 U.S. 693, 700 (1976) ("Violation of local law does not necessarily mean that

federal rights have been invaded."), *reh'g denied*, 425 U.S. 985 (1976).[10]

Numerous federal appellate courts have heeded this Court's reluctance to transform state-law transgressions into constitutional violations. *See, e.g., Natale v. Ridgefield*, 170 F.3d 258, 262 (2d Cir. 1999) ("Arbitrary conduct that might violate . . . state law is not sufficient to demonstrate conduct so outrageously arbitrary as to constitute a gross abuse of governmental authority that will offend [substantive due process]."); *Midnight Sessions, Ltd. v. Philadelphia*, 945 F.2d 667, 684 (3d Cir. 1991) ("federal courts do not sit in federal question cases to grant remedies for mere violations of state law"), *reh'g denied en banc*, 1991 U.S. App. LEXIS 25678 (3d Cir., Oct. 28, 1991), *cert. denied*, 503 U.S. 984 (1992); *Chiplin Enter., Inc. v. Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983) ("'even the outright violation of state law by local officials . . . does not automatically raise" a substantive due process claim).

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[10] Petitioners' misplaced reliance (at page 23 of the Petition) on *FCC v. Next Wave Person Communications*, 537 U.S. 293 (2003), and *SEC v. Sloan*, 436 U.S. 103 (1978), reflects a fundamental misunderstanding of constitutional law, federal administrative law, and state law. Federal agency violations of the Administrative Procedure Act have no bearing on alleged municipal agency violations of substantive due process rights. *Cf. Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 505 (2d Cir. 2001) (substantive due process forbids only "outrageously arbitrary" conduct constituting "a gross abuse of governmental authority," rather than "governmental actions that might fairly be deemed arbitrary or capricious and for that reason correctable in a state court lawsuit" (quoting *Natale*, 170 F.3d at 263).

Although "outrageously arbitrary" government action may violate substantive due process, *Natale*, 170 F.3d at 262, Petitioners have failed to show that the TLC Chairperson's implementation of the suspension and revocation policy met that standard. Thus, even assuming the policy was unauthorized without a full Commission vote, Petitioners have failed to establish a substantive due process violation.

Tacitly conceding this point, Petitioners argue that unauthorized governmental *policies* – as opposed to "random and unauthorized acts by particular officials" – somehow violate the Constitution, regardless of whether they meet the "outrageously arbitrary" standard (Petition at 22-23). Again, Petitioners are wrong.

First, this Court has held that "in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Sacramento v. Lewis*, 523 U.S. 833, 847 n.2 (1998). *See also Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 144-45 (2d Cir. 1994). Petitioners fail to cite any authority to support their competing view that this Court's "threshold question" is inapplicable to the TLC Chairperson's implementation of the suspension and revocation policy.

Moreover, Petitioners are wrong to assert that "this Court has never invoked substantive due process where a considered policy is involved" (Petition at 22). This Court routinely applies substantive due process standards to determine the constitutionality of "considered policies," such as statutes, regulations, and rules. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property"); *Kelley v. Johnson*, 425 U.S. 238,

247-48 (1976) (applying substantive due process standards to determine constitutionality of police department regulation regarding officers' hair-grooming standards).

When statutes, regulations and rules are at issue, however, the relevant substantive due process test is different: whether the challenged enactment bears a rational relationship to a legitimate government goal. *See, e.g., Kelley*, 425 U.S. at 247-48 (respondent failed to "demonstrate that there is no rational connection between the regulation . . . and the promotion of safety of persons and property"); *Interport*, 14 F.3d at 144-45. Even assuming the applicability of the "rational relationship" test here, Petitioners fail to argue, let alone show, that revoking hack licenses is rationally unrelated to the legitimate goal of reducing unjustified service refusals. Indeed, unjustified service refusals constitute misdemeanors under Article 4, section 40-e of the New York Civil Rights Law, and Petitioners' counsel has conceded that service refusals affect the public welfare (C.A. App. 91, 103).

Thus, Petitioners have failed to undermine the Second Circuit's rejection of their substantive due process arguments.

C. The Second Circuit Properly Rejected Petitioners' Procedural Due Process Claim.

This Court should also reject Petitioners' new and flawed procedural due process claim (Petition at 17), which is nothing more than a rephrasing of Petitioners' rejected vagueness challenge.

In addition to attacking the suspension and revocation policy on substantive due process grounds, Petitioners criticized the policy as unconstitutionally vague, because Rule 2-61(a)(2) forbids conduct adverse to the best interests of the public, rather than service refusals *per se*.

The Second Circuit and District Court properly rejected Petitioners' vagueness challenge, because drivers had fair notice that service refusals constituted conduct adverse to the best interests of the public, and therefore violated both Rule 2-50(b) (service refusals) and 2-61(a)(2) (best interests) (A3).

Petitioners now argue that the suspension and revocation policy violated drivers' procedural due process rights because drivers supposedly never received notice that one service refusal could result in license revocation (Petition at 17-18). This is false.

First, Rule 2-87(a)(1), which sets forth the penalties for service refusals, explicitly provides that "[n]othing contained herein shall limit or restrict any other authority the Commission may have to suspend or revoke a driver's license." *See also* Code § 19-505(*l*) (authorizing TLC to suspend or revoke licenses for any violation of the Code or Rules).

Moreover, on November 10, 1999, the TLC posted a notice "at TLC offices and taxi garages around the City" listing the penalties for service refusals (Petition at 8-9). The portion of the notice Petitioners fail to mention reminded drivers that the TLC "may, in its discretion, seek the penalty of revocation of the driver's license for any and all appropriate rule violations" (C.A. App. 229).

Furthermore, when rejecting Petitioners' vagueness challenge to Rule 2-61(a)(2) (best interests), the Second Circuit and District Court correctly noted that drivers had fair notice that service refusals constituted conduct adverse to the best interests of the public, and therefore violated both Rule 2-50(b) (service refusals) and 2-61(a)(2) (best interests) (A3). Petitioners cannot defeat these findings by restating their rejected vagueness argument as a notice argument.

Finally, Petitioners' reliance on criminal law cases is misplaced (Petition at 17-18). In *Lankford v. Ohio*, 500 U.S. 110, 111, 126-28 (1991), for example, this Court held that a criminal sentencing process violated the petitioner's procedural due process rights because, "at the time of [his] sentencing hearing, he and his counsel [lacked] adequate notice that the judge might sentence him to death." Here, by contrast, Petitioners have never argued that, during the TLC administrative process, Padberg was unaware that his service refusal could trigger license revocation.

Thus, this Court should reject Petitioners' new procedural due process argument.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

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APPENDIX

STATUTORY PROVISIONS

New York Civil Rights Law

Article 4

Section 40-e. Innkeepers and carriers refusing to receive guests and passengers

A person, who, either on his own account or as agent or officer of a corporation, carries on business . . . as common carrier of passengers, and refuses, without just cause or excuse . . . to receive and carry any passenger, is guilty of a misdemeanor.

Administrative Code of the City of New York

Title 19

Chapter 5

Section 19-505(*l*)

The commission may, after a hearing, suspend or revoke any driver's license for failure to comply with any provision of this chapter applicable to licensed drivers or for failure to comply with the commission's rules and regulations.

Section 19-506 Regulations and enforcement.

a. Unless otherwise set forth herein the commission may impose reasonable fines, suspend or revoke any driver's license or vehicle license where the holder has failed to comply with or has willfully or knowingly violated any of the provisions of this chapter or a rule or regulation of the commission.

Section 19-507 Mandatory penalties.

e. The term "without justifiable grounds" used in paragraphs one and two of subdivision a of this section shall mean that standard of behavior which fails to conform to that of a reasonable and prudent person acting in compliance with any regulations promulgated by the commission.

Rules of the City of New York

Title 35

Chapter 2

Section 2-50 Refusals.

(b) A driver shall not refuse by words, gestures or any other means, without justifiable grounds set forth in §2-50(e) herein, to take any passenger to any destination within the City of New York, the counties of Westchester or Nassau or Newark Airport. This includes a person with a disability and any service animal accompanying such person.

Section 2-61 Compliance with Law.

(a)(2) A driver, while performing his duties and responsibilities as a taxicab driver, shall not commit or attempt to commit, alone or in concert with another, any willful act of omission or commission which is against the best interests of the public, although not specifically mentioned in these Rules.

Section 2-86 Penalties for Violation of Rules Governing Taxicab Drivers.

Rule No.	Penalty	Personal Appearance Required
2-61(a)(2)	$150 – 350 and/or suspension up to 30 days or revocation	Yes

Section 2-87 Penalties Mandated by Local Law.

(a)(1) Any driver who has been found to have violated a provision of §§2-34(a), 2-50(a), 2-50(b), 2-50(c) and 2-50(d) or any combination thereof, shall be fined not less than $200.00 nor more than $350.00. Any driver who has been found in violation of any of the provisions of such rules or any combination thereof, for a second time within a twenty-four-month period shall be fined not less than $350.00 nor more than $500.00, and the Commission may suspend the driver's license of such driver for a period not to exceed thirty days. The Commission shall revoke the driver's license of any driver who has been found to have violated any of the provisions of §§2-34(a), 2-50(a), 2-50(b), 2-50(c) and 2-50(d) or any combination thereof, three times within a thirty-six month period. Nothing contained herein shall limit or restrict any other authority the Commission may have to suspend or revoke a driver's license.

(c) The Commission shall not issue any license to any person, who has had his taxicab driver's license revoked pursuant to §§2-34(a), 2-50(a), 2-50(b), 2-50(c) and [*sic*] 2-50(d) for a period of one year from the date of such revocation.

Section 2-88 Additional Penalties.

Violation of any of these rules may also lead to revocation or suspension of a taxicab driver's license . . . .

Chapter 8

Section 8-03 Penalties.

(a) Whenever a respondent is charged with a violation of any Commission Rule or Administrative Code Section, he may be subject to civil penalties in accordance with the appropriate schedule of penalties set forth in the Commission Rules or the Administrative Code.

(b) In the alternative to any of the specific penalties set forth in the Commission Rules, the Commission may, in its discretion, impose a penalty of license revocation, license suspension of up to six (6) months and/or a fine . . . .

Section 8-14 Discretionary Revocation Proceedings.

(a) The Commission may institute proceedings to seek the revocation of any license for the violation of any Commission Rule, whether or not the penalty of revocation is provided therein.

(b) . . . . If the specific rule violation charged provides for the discretionary penalty of revocation, the proceeding shall be commenced before the Commission Adjudications Tribunal and heard by an ALJ [administrative law judge].

(c) The Commission shall notify the respondent of such proceeding by serving a written summons or notice detailing the charged misconduct and warning the respondent that a finding of guilt could result in the revocation of his license.

(d) Said written charges shall be served upon the respondent in accordance with Section 8-05, if the hearing is to be conducted before the Commission's Tribunal. . . . .

(e) Said charges shall inform the respondent of the location, date and time of any scheduled hearing.

(f) . . . . If the hearing is commenced at the Commission's Adjudications Tribunal, the procedures set forth in this Chapter shall apply. The affirmative defenses set forth in subdivision b of Section 19-512.1 of the Administrative Code may be available in any such hearing.

(h) If the proceeding is conducted by the Commission Adjudications Tribunal, the decision of the ALJ shall be a Recommended Decision to the Chairperson. In such case, the ALJ will prepare and submit to the Chairperson a Recommended Decision containing his findings of fact, conclusions of law and recommended penalties.

(i) Upon the issuance of a Recommended Decision in accordance with either subsection (g) or (h), containing findings of fact, conclusions of law and any recommended penalty, the respondent shall be provided with an opportunity to provide a written response to said Recommendation, limited to the record of the hearing and the determination of the ALJ with respect to penalty only.

(j) The Recommended Decision issued in accordance with either subsection (g) or (h), will be submitted for consideration to the Chairperson. The Chairperson shall consider any written comments submitted pursuant to subsection (i) and shall determine whether to accept, modify or reject the Recommendation of the ALJ.

(k) A final decision of an ALJ may be appealed to the Deputy Commissioner for Legal Affairs/General Counsel pursuant to the provisions of Section 8-13. The final decision of the Chairperson, affirming, modifying or rejecting the Recommendation of an ALJ rendered pursuant to this Section may be appealed to the TLC Comm[]issioners. The respondent may appeal the Chairperson's decision within thirty (30) calendar days of the date of the Chairperson's final decision by filing a written appeal, setting forth the basis for the appeal and all statements and arguments made in support thereof, with the Deputy Commissioner for Legal Affairs/General Counsel. The Chairperson may prescribe the form for the conduct and filing of such appeals. Review of the Chairperson's decision shall be limited to the issues of law raised in the appeal submitted, and whether the decision of the Chairperson and the recommended decision of the ALJ is supported by substantial evidence. The Commissioners may not review findings of fact or determinations of credibility by an ALJ. The Agency may submit a written response to any appeal received by the Deputy Commissioner for Legal Affairs/General Counsel. The respondent shall be afforded the opportunity to respond in writing to the Agency's written submission. The Commissioners shall receive a copy of the ALJ's Recommendation, the Chairperson's decision, the appeal, and any responses filed by the Commission

or the respondent. The Commission shall, by majority vote of the Commission at a meeting at which a quorum is present and in which it is acting in a quasi-judicial capacity, either affirm, modify, or reject the Chairperson's decision and penalty. The Chairperson shall not vote on such appeals. The results of the vote and action taken by the Commission shall be communicated at a public meeting. The Commission shall also have the authority, where appropriate, to remand the matter to the ALJ for further consideration prior to rendering a decision.